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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case and its companion, No. 75-251, the essential question is whether Congress has the power to extend all the remedies of the Civil Rights Act of 1964 to state employers. There is no doubt that the Attorney General could obtain the back pay relief sought. There is no doubt that Congress clearly intended to authorize private suits by individuals against state employers and to afford them all relief necessary to end employment discrimination. There is no attack in this case upon the power of individual employees to bring this suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and to obtain from the federal court the injunctive relief necessary to end discrimination *together with* the considerable monetary consequences to Connecticut's retirement fund such injunctive relief entails. On behalf of the State, however, it is claimed that the Eleventh Amendment constitutes a jurisdictional bar to any other monetary "award" and that concern for the state fisc prevents any monetary award no matter how intertwined with the injunctive relief given and no matter how necessary to achieve such relief or to afford complete relief. The practical fear of the states

which led to the adoption of the Eleventh Amendment over 175 years ago — that they not be sued for their ordinary debts in federal courts by individuals — is being escalated towards subversion of aspects of Congressional legislation passed under both the Commerce Clause and Section 5 of the Fourteenth Amendment. In ratifying the Constitution and then the Reconstruction Amendments, the states surrendered portions of their sovereignty incompatible with those powers delegated to the federal government and executed by reasonable Congressional legislation.

When Title VII of the 1964 Civil Rights Act was amended in 1972 to include states, Congress recognized that the resources and efforts of the Attorney General were limited and that private suits were of paramount importance. Congress mandated that federal courts should for successful litigants tailor an affirmative, multifaceted, equitable remedy — and also award attorneys' fees. Congress knew, and this Court has recognized, that back pay and attorneys' fees were part of the total remedy necessary to eradicate discrimination and to deter employer delay and obstinancy. This nation's great goal of equal opportunity cannot be realized if multitudes of victims of discriminatory employment practices by supposedly benevolent state employers are not afforded the remedies indispensable to protect their rights. The Eleventh Amendment was not intended to cover monetary relief welded to the fulfillment of this national goal; but in any event — due to precedent, history, and policy — it must give way in areas of conflict with legislation implementing basic Fourteenth Amendment protections. The awards respondents seek do not threaten state sovereignty and are consistent with harmonious federalism in a modern society committed to ending discrimination.

We have said the foregoing in substance in our back pay brief in No. 75-251, and have also added to it the inappropriateness of any requirement that the state affirmatively "waive" any Eleventh Amendment immunity — even though strong indicia of waiver exist in this case. In this brief we therefore take a more limited (but still related) approach in seeking to uphold only an award of attorneys' fees against a state employer found to have engaged in forbidden discrimination. Such an award has a private attorney general rationale but was authorized for good and

sufficient reason by Congress. Such award, like back pay, is part of the remedial complex necessary to vindicate national policy of the highest priority. The strong national commitment to equal employment opportunity is reflected in this Court's express holding that an award of attorneys' fees to a successful plaintiff is required in Title VII cases in all but very unusual circumstances. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415 (1975). *Albemarle* would be dispositive of petitioners' claims, but for the Eleventh Amendment and the fact that the employer here was the State of Connecticut. The Eleventh Amendment does not, however, dictate a different result than that reached in *Albemarle*.

An award of attorneys' fees is different in both its underlying premises and its consequences from a monetary award of the kind foreclosed by *Edelman v. Jordan*, 415 U.S. 651 (1974). Attorneys' fees represent neither compensation for the prevailing party nor an accrued monetary liability. They arise out of litigation over which the federal courts have exclusive jurisdiction, and they have a prospective thrust and are necessary to achieve compliance with federal law. The power of the federal courts to award attorneys' fees to the prevailing party is an essential element of the remedial pattern of Title VII without which those courts will experience substantial difficulty in enforcing policies to which Congress has assigned the highest priority.

In addition to being consistent with *Edelman's* principles, a fee award does not come within its jurisdictional bar to awards of retroactive monetary damages. Such an award is not a separate cause of action but, like costs, is ancillary to or an incident of the court's decision. Congress has by statute reasonably made fees a part of costs, and costs are routinely awarded against states engaged in federal litigation. They are appropriate to control the conduct of the parties before the court and to foster the orderly administration of justice. Here the "sovereign" did not do right; instead it delayed corrective legislation until after the district court's injunctive decree. Moreover, there is now no suggestion by the State that it will voluntarily restore to the respondents either the expenses they incurred in eliminating discrimination in the State's retirement laws or the

benefits of which respondents were wrongfully deprived. The response of the State has been limited to an exaggerated concern for the preservation of its treasury, and in this respect it does not differ from a private employer. Unlike a private employer, however, a state which faces neither the prospect of an award of attorneys' fees nor an award of back pay has no incentive to resolve expeditiously litigation involving issues to which Congress has assigned the highest national priority. As this Court observed in *Albemarle Paper Company v. Moody*, 422 U.S. at 417, "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality".

ARGUMENT

I. An award of attorneys' fees to "Private Attorneys General" in Title VII litigation has been specifically authorized by Congress and recognized by this Court as vital to private enforcement of Federal laws of highest national priority.

That section of Title VII pertaining to attorneys' fees provides in pertinent part: ". . . the court, in its discretion, may allow the prevailing party . . . . a reasonable attorney's fee as part of the costs . . .". 42 U. S. C. § 2000e-5 (k). In a series of cases this Court has construed such language to require an award of attorneys' fees to a successful plaintiff "absent exceptional circumstances". *Newman v. Piggie Park Enterprises*, 309 U. S. 400, 402 (1968) (Title II of the Civil Rights Act of 1964); *Northcross v. Board of Education*, 412 U. S. 427, 428 (1973) (Emergency School Aid Act of 1972); *Albemarle Paper Company v. Moody*, 422 U. S. 405, 415 (1975) (Title VII). *Albemarle Paper Company* would completely dispose of the attorneys' fees issue here but for the fact that the employer here was the State of Connecticut. Petitioners, and *amici* in their support, argue that the Eleventh Amendment alters the result mandated in *Albemarle*. It does not.

Shortly before its decision in *Albemarle*, this Court held in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), that, absent explicit statutory authorization, federal courts do not have the power to award attorneys' fees under the private attorney general theory. Repeatedly Mr. Justice White for the majority stressed that the redistribution of

litigation costs was in the province of the legislature. The history of cost and fee legislation was reviewed, and specific examples were given of explicit provisions for attorneys' fees "under selected statutes granting or protecting federal rights". A preeminent example was the discretionary fee provision under Title II of the Civil Rights Act of 1964 as construed in *Newman v. Piggie Park Enterprises, supra,* and it was noted that Title II was intended, "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II" (and to vindicate a policy "that Congress considered of the highest priority"). 421 U.S. at 262.

Although in *Alyeska* the Court "had no occasion to address" the question of the permissibility under the Eleventh Amendment of an award against a state government (*id.* at 269, n. 44), awards of attorneys' fees, like back pay, are essential to the private enforceability of Title VII. See respondents' brief as petitioners in the companion matter, No. 75-251, pp. 22-24 (hereafter brief in 251). In a case like this or one involving discriminatory "fringe benefits" or pay differentials, the prospect of attorneys' fee awards may be even more important than any monetary aspects of the affirmative, equitable relief Congress provided in 42 U.S.C. § 2000e-5 (g). In any event, Congress has clearly spoken, and the reasons and policies underlying such awards are as strong as could be found under any private attorney general rationale. Here, in effect, 42 U.S.C. § 2000e-5 (f) (1) has constituted respondents as *statutory* private attorneys general.

Turning to the Eleventh Amendment aspect, the close connection between attorneys' fees and back pay is shown in a Note, *Attorneys' Fees and the Eleventh Amendment,* 88 Harv. L. Rev. 1875 (June 1975), (hereafter Note 88 Harv.), which takes some of the approaches of our brief in 251. This Note concludes at 1901 that Congress' power to resolve this problem of federalism is appropriate and that Congress be permitted to authorize fee awards in cases such as the one at bar. Fees and back pay as mandated by Congress are *both* necessary to fully enforce Title VII against states which engage in discrimination. Denial of both on Eleventh Amendment grounds would devastate the

private actions deemed so essential by Congress and this Court to the enforcement of Title VII. If this Court agrees with our position in 251 on back pay, then the applicability of the fee provisions should follow, *a fortiori*, under *Albemarle Paper Company*.

If this Court, like the Second Circuit, is inclined to disagree with us on back pay, we would urge a consideration of any essential differences in nature, purpose, and effect between fees and back pay in respect to the Eleventh Amendment, Congressional enforcement of the Fourteenth Amendment, and the attendant concerns for federalism and civil rights. Therefore, in this brief we note only the clear Congressional authorization of fees and the crucial need for such awards, and we maintain there are no "exceptional circumstances" allowing fees to be denied. We rely on our brief in 251 to present those points and authorities applicable to both back pay and attorneys' fees. Accordingly, we now turn to those special considerations concerning fees which should in any event allow them to survive an Eleventh Amendment attack.

II. Edelman v. Jordan does not preclude an award of statutory attorneys' fees; rather its principles uphold them as necessary to secure compliance with Federal law.

A. Conflict among the Circuits:

The court below (App. 47a) allowed an attorneys' fee award as a permissible "ancillary effect" under *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). Other circuits have looked to *Edelman* for guidance and have came to contradictory conclusions as noted in *Alyeska*, 421 U.S. at 269, n. 44; see also 270 n. 46. A comprehensive law review note concludes that the specific *Edelman* holding neither bars nor authorizes the award, that the question should be resolved within its analytical framework, and that under such analysis the Eleventh Amendment does not bar an award of attorneys' fees against a state official sued in his official capacity. See Note, *Awarding Attorneys' Fees Against a State Official Sued in His Official Capacity after "Edelman v. Jordan"*, 55 B.U. L. Rev. 228, 229-30, 241-42 (March 1975), (hereafter Note 55 B.U.). *Alyeska* does not affect the thesis of this Note.

What *Alyeska* did do was obviate the necessity of further consideration of those cases from circuits other than the Second on which state officials here rely and where fees not based on statutory authority were denied. It also left the decision of the Second Circuit as the only Court of Appeals precedent concerning fees authorized in Title VII by Congress. With respect to decisions in other circuits: *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), conflicted with a contemporaneous decision of another panel of the Sixth Circuit in *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974). This conflict was resolved in *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974) which then became "the ultimate position of [the Sixth] Circuit", 503 F.2d at 912 (dissent). On May 27, 1975, *Taylor v. Perini* was vacated and remanded for reconsideration in light of *Alyeska*. 421 U.S. 982. On the same date, *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3d Cir. 1974), was also vacated and remanded with a similar instruction for reconsideration. 421 U.S. 983. Since both cases appear to be controlled by *Alyeska*, further consideration of the Eleventh Amendment issue in *Taylor* and *Skehan* has probably been obviated. Although a petition for writ of certiorari was denied *sub nom Gilligan v. Jordan*, 421 U.S. 991 (1975), that decision, as was noted above, was not the "ultimate position" of the Sixth Circuit on the Eleventh Amendment issue.

The decision of the Fifth Circuit cited by the petitioners, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.*, 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975), was in direct conflict with a decision of another panel in that Circuit, *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973). In order to resolve this conflict, a consolidated hearing, *en banc*, was ordered for *Gates*, *Named Individual Members of the San Antonio Conservation Society*, and a third case, *Newman v. State of Alabama*, 503 F.2d 1320, at 1321 n.l (1974), *cert. denied*, 421 U.S. 948 (1975). On October 29, 1975, the Fifth Circuit, *en banc*, over strong dissents, vacated and remanded *Gates* and *Newman* for reconsideration in light of the supervening decisions in *Alyeska* and *Edelman*. *Gates v. Collier*, 522 F.2d 81; *Newman v. State of Alabama*, 522 F.2d 71. The denial of attorneys' fees in *Named Individual Members of*

the San Antonio Conservation Society v. Texas Highway Dept., was affirmed on the basis of *Alyeska*. — F.2d — (No. 74-1231, 5th Cir. *en banc*, Sept. 25, 1975). On February 3, 1976, the district court in *Gates v. Collier*, No. GC 71-6-K (ND Miss.) held, on remand, that neither *Alyeska* nor *Edelman* barred an award of $41,750 fees and $10,986.05 costs against the State of Mississippi.

Although there may no longer be any conflict in the narrow sense, however, we cannot conclude that the Third and Sixth Circuits would deviate in any material respects from their conclusions in *Skehan* and *Taylor*. They would rely mainly on the Second Circuit's decision regarding back pay in order to bar recovery of both back pay *and* attorneys' fees from state treasuries. That there is a conflict in the underlying reasoning of the several circuits on the meaning of *Edelman* cannot be questioned. See further, *Thonen v. Jenkins*, 517 F.2d 3, 7 (4th Cir. 1975); Note 88 Harv. 1975, 1876, 1889. Thus *Edelman* also must be further analyzed.[1]

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1. This analysis should not imply our acceptance that the Eleventh Amendment, *Edelman*, and especially *Hans v. Louisiana*, 134 U.S. 1 (1890), apply in this case to require "waiver". The *amici* brief of The Lawyers Committee for Civil Rights Under Law *et al* in 251 cogently argues that Article III conferred federal judicial power over federal question claims against states by individuals, that the Eleventh Amendment did not withdraw that power, and that the broad declaration in *Hans* that Congress lacks power to confer federal jurisdiction over federal question suits against states was unfaithful to historical and judicial precedents — and was later made inapplicable when Congress acting under the Commerce Clause expressly conferred federal question jurisdiction over states. A strong and thought-provoking critique of *Hans* appears in a comprehensive article, Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colo. L. Rev. 1, 28-32, 60-72 (1972). See further, *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 313 (Brennan, J., dissenting); and Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1, 17-35 (1967) (Eleventh should never have been extended to actions to protect federal rights). These views fortify our argument in Section III of our brief in 251 that no state consent is necessary in the face of Congressional legislation enforcing the Fourteenth Amendment. At the very least waiver should readily be found from slight or ongoing state activity affecting federally regulated areas. Recently, a federal court held that Delaware's continuing operation of state mental health institutions after enactment of 1974 Fair Labor Standards Act amendments authorizing individual employees to sue their state employers, constitutes implicit waiver of that state's Eleventh Amendment immunity to federal suits under that "commerce clause" Act. *Carey v. White*, — *F. Supp.* — , 44 U.S. L.W. 2338 (D. Del., Jan. 6, 1976).

B: Edelman analysis supports fees:

As already pointed out in our brief in 251, *Edelman* does not involve Congressional authorization to sue states and does not bar all monetary impact on state treasuries. There are additional aspects of *Edelman* which lead to the conclusion that its principles give no support to fee denial but instead permit statutorily based awards against states in cases like the one at bar.

1. There is only one sentence in *Edelman* that furnishes any support for the broad view that it bars any conceivable monetary award:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663.

This is not the *Edelman* holding, but rather a summary of three cited cases which involved state statutory tax refund schemes that required judgments in favor of the taxpayers to be paid out of the state treasury. Such refunds are like accrued monetary liability existing at the time suit is commenced and are usually, but not invariably, barred by *Edelman*. They are readily distinguishable from fees. Moreover, these cases did not consider the relevance of *Ex parte Young*, 209 U.S. 123 (1908). *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945), did not and could not involve *Ex parte Young*, since an agency of the state itself was sued. (The fiction deemed necessary to the result in *Ex parte Young* could readily have been extended to cover awards against defendant state officials in spite of the probability that payment would ultimately be out of state treasuries.)

2. What *Edelman* essentially prohibited was an award of retroactive welfare benefits which, like an award of damages, was "an accrued monetary liability" — "a form of compensation" — "resulting from a past breach of legal duty" (albeit a duty arising under a regulation rather than derived from the Constitution). 415 U.S. at 664, 668. Fees, however, possess none of these features; they are not an accrued liability at the time of suit, or compensation for same; there is "no separate cause of action", let alone a "third" cause of action, for them. Fees are not measured by the loss resulting from a past breach of legal

duty. Fees are an expense of litigation, and they are usually measured by the reasonable value of services of counsel in asserting plaintiffs' rights. However, time and money are only a partial measure where the purpose of the statutory awards is to induce litigants to vindicate constitutional rights and important public interests. *Newman v. State of Alabama*, 522 F.2d 71, 75 (5th Cir. 1975) (dissent); Notes, 88 Harv. at 1895-96 and 55 B.U. at 233-34.

3. *Edelman* permitted fiscal impact, of even major proportions, where that effect was "a necessary consequence of compliance in the future with a substantive federal question determination . . . . ." 415 U.S. at 668. As we shall shortly demonstrate more fully, fee awards are well within the range of what is permissible under *Edelman*. They are a necessary cost of litigation to obtain an injunction which secures compliance with federal law; and they are necessary to control the conduct of the parties.

4. *Edelman*, moreover, was concerned, at 415 U.S. 666 n. 11, with the assumedly different fiscal consequences between retroactive and prospective relief — a distinction not made in Title VII. This aspect is considered in regard to back pay on page 39 of our brief in 251 and Note 88 Harv. at 1880-82, 1896. Aside from not being "retroactive", fee awards clearly have a minimal fiscal impact. *Newman v. State of Alabama*, 522 F.2d at 75. Predictions of state officials to the contrary are as exaggerated as their budgetary warnings are hollow. (Petitioners' brief, pp. 9-11).

5. Lastly, the right to receive welfare benefits asserted by plaintiffs in *Edelman* does not directly arise from rights given by legislation implementing the equal protection clause of the Fourteenth Amendment. Unlike the right arising under that Amendment and its implementing legislation, the welfare rights involved in *Edelman* were not fundamental rights the enforcement of which Congress has determined to be of the "highest priority". The *statutory* private attorney general concept expressly validated by this Court in *Alyeska*, is the vehicle which Congress, for very substantial reasons, has selected as most appropriate to the enforcement of such fundamental rights.

C. Fees help obtain compliance with federal law:

Turning to the ambit of awards permissible under *Edelman's* standard of securing compliance with federal law, cases from two circuits have demonstrated that awards were essential to ensure future compliance with injunctions previously entered against state officials. In *Rodriguez v. Swank*, 496 F.2d 1110 (7th Cir.), *cert. denied*, 419 U.S. 885 (1974), one hundred dollars was awarded to each future welfare applicant whose application was not timely processed under a prior court order. This was permissible under *Edelman* because "the fiscal consequence to the treasury was the necessary result of attempts to gain compliance with a decree which by its terms was prospective in nature". *Id.* at 1113. This rationale was followed and extended in *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974), which awarded attorneys' fees against a welfare commissioner who was not complying with a prior injunction. Again, the concern was not compensation for loss but guarantee of future compliance. "In finding that the Eleventh Amendment does not immunize the Commissioner from liability in his official capacity, we underline the forward-looking, deterrent nature of this award." *Id.* at 127.

Even assuming that *Class v. Norton* gave a liberal reading to some of *Edelman's* language, the focus on attorneys' fees as a means of achieving future compliance with the law is consistent with the prospective thrust of *Edelman*. The importance in *Edelman* of the federal courts' ability to require future compliance by states should impose on states not only the cost of such compliance *but also the cost of achieving it. Newman v. State of Alabama, supra*, 522 F.2d at 75; Notes, 88 Harv. at 1893-95 and 55 B. U. at 237-241. The court below, in adhering to *Class v. Norton* (App. 47a-48a), readily saw the prospective nature of fee awards, "based on the state's failure in its duty to conform its conduct to federal law and its threatened continuation on the same illegal course in the future".

This statement, and the decision of that court in *Class*, also reflect a "bad faith" element of state conduct present in this case which alone might constitute a separate ground for awarding fees even absent statute. *Alyeska*, 421 U. S. at 258-259; Note 88 Harv. at 1882, 1892. This Court further suggested in *Alyeska*, 421 U.S. at 270, n. 46, that the Eleventh Amendment may not

bar an award of attorneys' fees under the bad faith exception. Although there is no claim that the defendant officials themselves acted in bad faith, we have pointed out in our brief in 251 at pages 25 and 33, and reemphasize here, that in two successive sessions of Connecticut's General Assembly discrimination was not removed from the face of the retirement laws, that only the District Court's order finally ended the *de jure* discrimination, and that then the state officials did not bother to appeal. Most of the claim for recalculated retirement benefits arose in this period of obdurate delay and inaction *after suit was brought*, and thus points up the similarity — and necessity — of both fee and back pay awards. Here, state officials disclaim any fiscal consequence for "toughing it out" in defiance of federal law as long as possible until a federal court acted — an employer tactic Congress correctly foresaw and legislated to discourage.[2]

Fee awards are an appropriate and necessary means for federal courts to regulate the conduct of litigants, especially in suits brought under the *Ex parte Young* doctrine. Is is inequitable for a state to force plaintiffs to engage in unnecessary litigation without any risk of a fee award if its defense is without merit, as was the case here and in other cases. See Note 55 B. U. at 239 and n. 66. In this action, each retired male employee had only a small financial stake but at least had the advantage of a class. In many discrimination cases an individual, often poor and downtrodden, is pitted against state resources and salaried legal talent in potentially complex litigation, with the problems attendant upon payment of his attorney only in the event of final victory. The victim's attorney deserves some tangible reward even where the losing defendant acts "in good faith". Otherwise, private suits will be discouraged, and recalcitrant state employers will be deterred only from prompt compliance with federal law.

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2. Recently, a three-judge district court found certain provisions of the New York Education Law unconstitutional as discriminating against two resident aliens, ordered defendant state officials to process the pending tuition assistance application of one and requalify the other for a scholarship *as of the dates suits were started*, and then said that *Edelman* did not allow any award of monetary damages. *Mauclet v. Nyquist*, and *Rabinovitch c. Nyquist*, Civ. 75-73 (WDNY) and 74-1142 (EDNY) Consolidated (Feb. 11, 1976). In effect, the line for determining "retroactivity" was drawn as of the dates the state was put on notice by filing of the complaints, rather than the later decree date.

The rights discrimination victims seek to enforce are of far greater import than the immunization of state treasuries from all awards. Congress, as is proper, has "arbitrated" the federalism problem involved and then set the national policy and implemented it by those remedies essential to enforce equal employment rights. Federal courts can evaluate, and if need be minimize, any significant degree of immediate fiscal impact upon state treasuries. We ask this Court to keep the Eleventh Amendment in a proper federal perspective harmonious with the paramount national policy involved in legislation enforcing the Fourteenth. Any extension of the entrenched and necessary "fiction" of *Ex parte Young* would be slight, and wholly consistent with the great purpose it has served for years in the protection of constitutional rights in our federal system from diminution by state action.

III. There is no jurisdictional bar to an award of fees against the state, especially where the fees are made costs by Federal statute and are necessary to Court control of litigants' conduct.

The Eleventh Amendment and *Edelman* manifestly concern federal court jurisdiction. *Edelman* held that a suit which seeks the award of an "accrued monetary liability" payable from state revenues is generally beyond federal court jurisdiction. We have just shown that fees do not resemble monetary damages; they are not a "third" cause of action prohibited by *Edelman* (nor is the back pay aspect of the total Title VII relief sought even a second cause of action). Here the federal court had jurisdiction to decide the case, and the fee award is ancillary to or an incident of its decision. In choosing to defend an action properly brought in a federal forum, defendants must assume the usual incidents of the suit, including costs, witness fees, and attorneys' fees. Indeed it follows from *Ex parte Young* that a state will be required to expend funds in the course of litigating cases such as this, including the salaries of its Attorney General and assistants.

Two cases in this Court not involving the Eleventh Amendment acknowledge the incidental nature of fees or costs. In *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 723 (1974), where there was a fee statute regarding school

desegregation cases, the Court noted that a "district court must have discretion to award fees and costs incident to the final disposition of interim matters". In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 74 (1927), the Court denied the state's motion to retax costs awarded against it when it lost a criminal appeal, and stated that, "[t] hough a sovereign, in many respects, the State when a party to litigation in this Court loses some of its character as such." According to *Thonen v. Jenkins, supra*, 517 F.2d at 7, fees "are much more analogous to costs of litigation", which are still taxable against states after *Edelman, cf. Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). They are generically the same as court costs, recoverable as part of the litigation expense by the prevailing party. *Souza v. Travisono*, 512 F.2d 1137, 1140 (1st Cir. 1975), *vacated and remanded* on basis of *Alyeska*, 96 S. Ct. 19.

This easily recognized but sometimes overlooked jurisdictional inability of federal courts to award accrued damages under *Edelman* does not apply to usual costs, or even to fees. This is so, *a fortiori*, where fees are made costs by Congressional enactment. Here, 42 U.S.C. § 2000e-5(k) is plain: the court may award "a reasonable attorney's fee *as part of the costs . . .*" (emphasis added).

Aside from the important reasons Congress had for authorizing fees, its treatment of them as costs indicates at least two basic considerations in TitleVII litigation: first, fees are necessary monetary incidents of court relief, and second, fees are necessary controls upon the behavior of the parties before the court. In civil rights litigation, it is especially appropriate to encourage prompt assessment of legal positions and to discourage delaying tactics, nonmeritorious defenses, and other maneuvers which may at some uncertain point become tantamount to "bad faith". Such awards are consistent with the inherent powers of the courts to promote their own effective functioning and the orderly administration of justice. Thus comments about state delay in the prior section of this brief bear mention and perhaps have greater relevancy here. Note 88 Harv. at 1890-93, esp. 1892.

State officials, however, decry even small amounts from state treasuries and are so blinded by alleged fiscal concerns that they

completely disregard state conduct no matter how deplorable — and national policy and human rights no matter how fundamental. Their fiscal worries truly equate with "legal irresponsibility" and demean not only individual dignity but also modern balanced federalism. Unless official wrongdoing is to be sanctioned, states must be subordinate to national legislation of paramount importance and moral force, and they and their officials should be always subordinate to the fundamental rights of the individual persons they are supposed to serve.

Entirely forgotten in the petitioners' overriding concern with the preservation of the treasury of the State of Connecticut is the fundamental premise underlying both sovereign immunity and its jurisdictional concommitant, the Eleventh Amendment- that the sovereign could and would do justice in any case brought to its attention. Brief in 251, pp. 47-52. Supporters of sovereign immunity argued,

> "It is false in theory to suppose that when an individual has a just claim against the Government it is necessary for him to sue the Government in a court of law to recover it."
>
> Remarks of Congressman Diven, brief in 251, p. 48.

But as this case demonstrates, the theory did not prove false. The briefs of the petitioners and of various *amici* states in support are as remarkable for what they fail to say as for what they do say. Nowhere do petitioners assert that the State of Connecticut can or would voluntarily restore to the respondents the benefits unlawfully denied them. Nowhere in the various *amici* briefs is there any suggestion that any of the interested states could or would voluntarily act other than as Connecticut has done. In order to obtain the justice to which they were entitled, the respondents were required to initiate this litigation and incur expenses. Now the officials of Connecticut and the *amici* states presume to claim the benefits of sovereignty, without accepting its responsibility to do right. Their sole and overriding concern is with the "preservation" of the treasury, and in this respect they are indistinguishable from employers in the private sector. Their misconduct should carry like consequences, including attorneys' fees, as Congress intended.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals as to attorneys' fees should be affirmed.

Respectfully submitted,

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